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No. 01-706

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

REX R. SPRIETSMA,

Petitioner,

v.

MERCURY MARINE,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE NATIONAL MARINE MANUFACTURERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Federal Boat Safety Act of 1971 preempts a state common law standard or requirement that recreational boats be equipped with propeller guards, on either of two alternative grounds: (1) the Act expressly preempts any such standard or requirement unless the Secretary of Transportation has granted an explicit exemption, which has not happened here; and (2) the United States Coast Guard, after extensive administrative proceedings, has made an affirmative decision not to regulate, based in part on the determination that any such standard or requirement would be contrary to the interests of boat safety, thus negating it under settled principles of implied preemption?

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INTEREST OF *AMICI CURIAE*

The National Association of Manufacturers is the nation's largest industrial trade association.[1] The NAM represents 14,000 member companies, including some 10,000 small and mid-sized companies. In addition, it represents 350 member associations that, in turn, serve manufacturers and employees in every industrial sector and all 50 states. All together, the NAM comprises about 18 million people who make things in America.

The National Marine Manufacturers Association comprises more than 1,200 companies, which produce about 80% of the marine products used by recreational boaters and anglers in the United States. As boat shows have become the industry's premier marketing tool, the NMMA regularly produces shows in key markets to provide quality showplaces for exhibitors and consumers. In this country, boats and related products and services account for an estimated $25 billion in retail sales annually.

Taken together, these organizations and their members all have a general interest in the interpretation and application of the various federal statutes governing transportation safety, and in determining their proper relationship to those state laws, requirements, and standards that are applied to the same matters. In addition, both the NAM and the NMMA – along with their many members who manufacture recreational vessels and associated equipment – have a direct interest in the issues raised here concerning the proper scope and effect of the preemption provisions contained in the Federal Boat Safety Act of 1971.

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[1] Both petitioner and respondent have consented to the filing of this brief in letters that are on file in the Clerk's office. Pursuant to S. Ct. R. 37.6, the undersigned counsel for the *amici curiae* state that they alone have authored this brief, and no other persons or entities have made a monetary contribution to its preparation or submission.

INTRODUCTION

The Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (1994), contains three provisions that are relevant to the preemption issues presented in this case.

Section 4306, entitled "Federal preemption," provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

As referenced in the foregoing provision, Section 4305, which is entitled "Exemptions," provides:

> If the Secretary considers that recreational vessel safety will not be adversely affected, the Secretary may issue an exemption from this chapter or a regulation prescribed under this chapter.

Section 4311, which is entitled "Penalties and injunctions," addresses the various remedies that are available for violations of the Act, and also provides in subsection (g):

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

These statutes must be construed in view of the specific legislative objective, which was to govern maritime commerce for vessels operating "on waters subject to the jurisdiction of the United States . . . and, for a vessel owned in the United States, on the high seas." 46 U.S.C. § 4301(a).

SUMMARY OF ARGUMENT

1. In crucial respects, the relevant provisions of the Boat Safety Act differ significantly from the analogous provisions of the Motor Vehicle Safety Act that the Court construed and applied in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). Section 4306 of the statute expressly preempts those state laws and regulations imposing standards or requirements with respect to the design and performance of boats and associated equipment, with only three exceptions: (i) the States may establish, continue in effect, or enforce laws that are identical to federal regulations; (ii) the States may apply to the Secretary for an exemption from the Act or from the regulations prescribed thereunder, authorizing them to apply differing laws; and (iii) the States may regulate the carrying or use of marine safety articles to meet uniquely hazardous local conditions, unless the Secretary specifically disapproves such action.

If none of these exceptions applies, the Boat Safety Act explicitly preempts state law governing boat design and performance – *without regard to* whether a federal regulation governs that same aspect of boat design or performance. Here, the Coast Guard has not required propeller guards on outboard motors. The State of Illinois has not obtained authorization to require propeller guards and does not claim that they would address any uniquely hazardous local conditions. Therefore, petitioner's tort claim based on respondent's failure to install propeller guards is expressly preempted.

2. Petitioner and the Solicitor General counter that state common law damages actions enjoy a blanket immunity from this straightforward preemption analysis because state common law is not a state "law or regulation" and does not impose any legal "standard" or "requirement" within the meaning of this clause. That is wrong. The Court has rejected this argument in prior cases, holding that broad terms in a preemption clause such as "standard[s]" and "requirement[s]" can and do encompass state common law. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 503-05 (1996) (Breyer, J., concurring in part); *id.* at 509-12 (O'Connor, J., concurring and dissenting in part); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Group, Inc.*, 505

U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); *id.* at 548-49 (Scalia, J., concurring and dissenting in part). The Court's analysis of the distinct statutory scheme in *Geier* is not to the contrary, and no other justification is presented for departing from these authorities here.

Moreover, the position taken by petitioner and the Solicitor General ignores the fact that state common law is an integral part of the corpus of state law, and that it sets "standards" and "requirements" that govern private conduct just as much as state positive law does. Their argument also rests on the bizarre assumption that Congress intended a single state jury – an *ad hoc* collection of citizens assembled to hear one case – to have more power to regulate private conduct in a manner different from the federal government than duly elected and appointed state officials. Finally, their suggested approach, if accepted, would undermine the settled holding of cases as basic as *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

3. Petitioner and the Solicitor General further contend that the so-called "saving" clause in the Boat Safety Act negates its express preemption of common-law tort suits. That, too, is incorrect, and cannot be premised on the distinct statutory scheme at issue in *Geier*. The preemption clause here contains its own saving provisions, which operate to save state law from preemption where it is identical to federal law, where an exemption is granted to authorizing the application of differing state laws, and in limited circumstances to address uniquely hazardous local conditions. Yet Section 4311(g) is more properly viewed as an "anti-affirmative-defense" clause, which simply disclaims any federal immunity from liability at state law, thus freeing each State to determine for itself whether compliance with pertinent federal requirements (the "government standards" defense) will be recognized as an affirmative defense in an *otherwise permissible* state-law cause of action. The claim that this provision should be read instead as a broad "anti-preemption" clause is inconsistent with the plain language and legislative history of the statute.

In any event, the Court has repeatedly held that the general language of a so-called "saving" clause cannot negate the plain terms of an explicit preemption clause. *See, e.g., Morales v. Trans*

World Airlines, Inc., 504 U.S. 374, 385 (1992). More generally, the Court has routinely given these general clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. *See, e.g., Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-52 (1987).

4. Moreover, petitioner's claims also fail under the same implied-conflict preemption analysis applied in *Geier*. As the Court has consistently held, the mere existence of a preemption clause and of a so-called "saving" clause in the Boat Safety Act does not eliminate the need for such analysis. *See, e.g., Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001); *Geier*, 529 U.S. at 869.

Here, the Coast Guard invoked its statutory process for regulating boat safety to examine whether to mandate propeller guards on recreational vessels, and made an affirmative decision not to regulate by imposing such a requirement. The necessary result, therefore, is that any such requirement imposed by state law is impliedly preempted. *See Geier*, 529 U.S. at 874-86; *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978). Indeed, the Coast Guard's explicit decision to gather more data on the costs and benefits of installing propeller guards, as well as their effect on safety, is directly inconsistent with a regime in which each State is free to require propeller guards by imposing liability (including potential punitive damages) on any manufacturer that does not install them on all of its vessels. *See Geier*, 529 U.S. at 875. Moreover, as a practical matter it would be unfair and unworkable to hold manufacturers liable for fines, penalties, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the federal agency's determination that it would undermine public safety to require vessels to be equipped with propeller guards.

ARGUMENT

I. THE BOAT SAFETY ACT EXPRESSLY PREEMPTS STATE LAW GOVERNING THE DESIGN AND PERFORMANCE OF RECREATIONAL VESSELS AND ASSOCIATED EQUIPMENT.

The relevant provisions of the Boat Safety Act differ in critical respects from the analogous provisions of the Motor Vehicle Safety Act, which the Court construed in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). Those differences are significant in determining the distinct scope of preemption under the two statutes.

In *Geier*, the Court held that the preemption clause in the Motor Vehicle Safety Act does not expressly preempt common-law claims. Based on the specific wording of that preemption provision, the Court noted that it "would pre-empt all nonidentical state standards established in tort actions covering the same aspect of performance as an applicable federal standard, even if the federal standard merely established a minimum standard." *Id.* at 868. The inevitable result thus would be to extinguish virtually any "potential 'liability at common law,'" and "[h]ence the broad reading [of the preemption clause] cannot be correct." *Id.*

As discussed below, however, that same analysis is not germane to the Boat Safety Act for two reasons. *First*, the Boat Safety Act contains unique language that is directly and more broadly preemptive of state law. This is understandable in the realm of maritime commerce, where the federal government has always played an especially active role. *Second*, the Boat Safety Act contains an explicit mechanism for modifying and limiting its broad preemptive scope, by granting the Secretary of Transportation express authority to grant exemptions from preemption – both from the statute itself and from any implementing regulations – in any area deemed appropriate. Indeed, the administrative history implementing the Boat Safety Act reveals that this authority has

been aggressively employed, consistent with the view that the statute itself broadly and expressly preempts state law.[2]

A. The Statutory Provisions.

The preemption clause in the Boat Safety Act provides as follows:

> *Unless permitted by the Secretary* under section 4305 of this title, a State or political subdivision of a State *may not* establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306 (emphasis added). Under this plain language, state law is preempted unless it imposes standards that are identical to those imposed in a federal regulation governing boat safety. Left at that, this statutory language would appear to run afoul of the same

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[2] Much of the background that the Government presents in support of its litigating position in this case differs markedly from the brief it filed on the same preemption issue in a virtually identical case just four terms ago. *See* Brief of the United States as Amicus Curiae, *Lewis v. Brunswick Corp.* (U.S. No. 97-288), *cert. dismissed*, 523 U.S. 11-13 (1998). There the Solicitor General explained that the plain language of the Boat Safety Act, its legislative history, and its subsequent administrative history all support the view that the statute is intended to preempt state law regulating the design and performance of recreational vessels and their associated equipment, subject only to certain exceptions that are specified in 46 U.S.C. § 4306 itself. *See id.* at 14-15. None of this explanation appears in the Solicitor General's brief in this case. Although the Solicitor General in *Lewis* ultimately rested on the same distinction drawn here – between common-law standards, on the one hand, and statutory or regulatory standards, on the other – this alleged distinction is unpersuasive, for reasons discussed in more detail in Sections II and III, *infra*.

concerns that the Court identified in *Geier*. But the Boat Safety Act does not leave matters there; instead, it provides an explicit mechanism for mitigating the broad scope of express preemption, which the Secretary can invoke by "issu[ing] an exemption from this chapter or a regulation prescribed under this chapter." *Id.* § 4305. In fact, the Secretary may exercise this authority whenever he can establish that "recreational vessel safety will not be adversely affected." *Id.*; *see also* 44 Fed. Reg. 21,109, 21,109-10 (Apr. 9, 1979) (exemptions from preemption "would be considered on the basis of whether they would adversely affect boating safety").

By contrast, the preemption clause of the Motor Vehicle Safety Act contains no such escape hatch and is much narrower on its face:

> When a motor vehicle safety standard *is in effect* under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. . . .

49 U.S.C. § 30103(b)(1). Indeed, with respect to a distinction that is of immense importance in the circumstances of this case, the plain language of the Motor Vehicle Safety Act creates *no preemption* in any area *unless* a federal regulation governing the same aspect of performance is in effect. By contrast, the Boat Safety Act explicitly imposes preemption – *without regard to* whether any federal regulation whatsoever is in effect – unless the Secretary has granted an exemption addressing that particular area.

As the Solicitor General explained in *Lewis*, therefore, the text of Section 4306 of the Boat Safety Act appears expressly to preempt state law regulating the design and performance of recreational vessels and their associated equipment, subject only to three exceptions set forth in the preemption clause itself. *Compare* U.S. Br. in *Lewis, supra*, at 14-15 *with* U.S. Br. 11-13. First, Congress has authorized the States to enforce laws that are "identical" to regulations adopted by the Secretary. Second, the States may apply to the Secretary for authorization to enforce differing laws. Third, the States may regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the

State, unless the Secretary specifically disapproves. *See* U.S. Br. in *Lewis, supra*, at 14-15.

As the Solicitor General further noted in *Lewis*, this reading of the broad preemption clause contained in the Boat Safety Act is confirmed by its legislative history. *See* U.S. Br. in *Lewis, supra*, at 14. The Senate Report on the proposed legislation stated that it was intended to have broad preemptive effect, explaining the preemption clause as follows:

> This section provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements. . . . The section does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern.

S. Rep. No. 92-248, at 20 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1341. The Report emphasized that the "need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of *uniform* construction and equipment standards at the Federal level." *Id.* at 14 (emphasis added). While the language of the Act phrased the Secretary's obligation to issue regulations in permissive rather than mandatory terms, "the Committee expect[ed] that initial standards will be promulgated as soon as practicable," against this backdrop of broad federal preemption. *Id.* at 17. "It was precisely to take advantage of the expertise and flexibility available in the administrative process in these regards, and the possibility for continuous review and updating of the standards, that the Committee opted for a system of administrative rather than statutory standards." *Id.*

Moreover, the broad preemption accomplished in the Boat Safety Act was, as the Senate Report noted, squarely in line with the "long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in

interstate commerce," particularly with respect to the design and manufacture of vessels rather than their operation and use. S. Rep. No. 92-248, *supra*, at 20. The Court long ago acknowledged the same point, stating that "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215 (1917); *see also United States v. Locke*, 529 U.S. 89, 108 (2000) (same).[3]

B. Administrative Implementation of the Statute.

In *Lewis*, the Solicitor General explained in some detail that a broad construction of the preemption clause accords with the administrative history implementing the Boat Safety Act. *See* U.S. Br. in *Lewis, supra*, at 14-15. The day after the Act was signed into law, the Secretary issued a statement exempting all existing state "laws and regulations" from preemption under the express language of the new statute. 36 Fed. Reg. 15,764-65 (Aug. 11, 1971). The Secretary noted that he was acting under the authority conferred by Congress, which provided that the Secretary "may, if he considers that boat safety will not be adversely affected, issue exemptions from any provision of this Act or regulations and standards established thereunder, on terms and conditions as he considers appropriate." *Id.* (quoting 46 U.S.C. § 4305). Because "[b]oating safety will not be adversely affected by continuing in effect those existing laws and regulations," the Secretary exempted each State from the operation of the express preemption clause, which "prohibit[s] any of those jurisdictions from continuing in effect or enforcing any provision of law or regulation that is not identical to a Federal regulation." 36 Fed. Reg. at 15,765. The exemption was to remain in effect "until expressly superseded, revoked, or otherwise terminated." *Id.*

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[3] Although this case was brought "in an Illinois court, under Illinois law," *see* Pet. App. 7, the Illinois Supreme Court correctly recognized that it was an "admiralty" case subject to "federal maritime jurisdiction," *see id.* at 6, as even one of petitioner's *amici* concedes. *See* ATLA Br. 21-29 (arguing strenuously that the cause of action should have been understood to arise under "federal maritime common law.").

About a year later, the Coast Guard exercised the authority delegated by the Secretary to issue voluminous regulations governing boat safety pursuant to 46 U.S.C. § 4302. *See* 37 Fed. Reg. 15,777-85 (Aug. 4, 1972). These regulations cover a broad spectrum of safety matters, such as requirements for safety equipment to be carried on boats; design standards for horsepower, electrical, fuel, ventilation, and start-in-gear systems; and measures to correct especially hazardous conditions. *See, e.g.*, 33 C.F.R. Parts 173-75, 177, 179, 181, 183, 187 (1997); *see also* U.S. Br. 3 n.1. Thereafter, the Coast Guard proposed to replace the previous blanket exemption from preemption with a more limited provision, noting that "[t]he issuance of these regulations removes the necessity for an exemption to the prohibitions of [the Act's preemption clause] concerning performance or other safety standards for boats." *See* 38 Fed. Reg. 71 (Dec. 27, 1972). The blanket exemption from preemption for state laws concerning boat performance or safety standards was eventually eliminated. *See* 38 Fed. Reg. 6914-15 (Mar. 8, 1973).

Nothing in the administrative history implementing the Act suggests that the exemptions to preemption granted first by the Secretary and later by the Coast Guard do not apply to state common law. Indeed, the Coast Guard explained its later, more limited, exemption by noting that it "will *principally* [but not solely] affect State statutes and regulations." 38 Fed. Reg. at 6914 (emphasis and bracketed material added). *See also infra* Sections II & III.

Both the legislative history and subsequent administrative history implementing the Boat Safety Act thus reinforce the plain language of the preemption clause. That provision operates to preempt all state laws that are not "identical" to federal regulations, unless they concern certain uniquely hazardous local conditions or unless the Secretary specifically confers additional authority to act.

C. Preemption Is Proper in This Case.

Here, the Court's application of the statute's preemption analysis is relatively uncomplicated. The Coast Guard has not required manufacturers to install propeller guards on outboard motors. The State of Illinois has not obtained authorization from the Secretary to require manufacturers to install propeller guards, and

no claim has been made that they would address any uniquely hazardous local conditions. Petitioner's tort claim based on respondent's failure to install propeller guards is thus expressly preempted by the Boat Safety Act.

Moreover, there is no basis to apply some sort of presumption against preemption here. To begin with, in *Geier*, the Court specifically rejected the notion that it should impose any "special burden" on the party advocating preemption, and instead held that "ordinary preemption principles, grounded in longstanding precedent," were applicable. *See Geier*, 529 U.S. at 870-74. As discussed above, this evenhanded approach is even more obviously appropriate in the realm of maritime commerce, and in view of the more explicitly preemptive provisions of the Boat Safety Act. *See, e.g., Locke*, 529 U.S. at 108 (when "state laws . . . bear upon national and international maritime commerce, . . . there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers"). In addition, where state and federal law collide, the Supremacy Clause settles the matter and there is no place for presumptions, no matter how much the matter may traditionally be in the state domain: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962).

Petitioner and the Solicitor General seek to avoid this straightforward result under the plain language of the statute by arguing that: (1) the preemption clause contained in Section 4306 of the Boat Safety Act does not encompass "standards" and "requirements" imposed by state common law; and (2) in any event, Section 4311(g) of the Boat Safety Act should be read to override the preemption clause and to preserve all state common law. *See* U.S. Br. 12-23. These arguments miss the mark, as shown in Sections II and III, *infra*.

II. THE PREEMPTION CLAUSE APPLIES TO ANY REQUIREMENTS IMPOSED UNDER STATE COMMON LAW AS WELL AS THOSE IMPOSED BY STATE STATUTE OR RULE.

The preemption clause in the Boat Safety Act states that no State may "establish, continue in effect, or enforce a law or regulation" establishing a "performance or other safety standard" or imposing such a "requirement" for recreational vessels and their associated equipment, which is "not identical to" a regulation prescribed by the Coast Guard under the Act. 46 U.S.C. § 4306. Petitioner and the Solicitor General contend that this provision encompasses only "state legislative and administrative enactments," but not common law. Pet. Br. 25-28; U.S. Br. 13 & n.3. They thus argue that *all* common law damages actions – regardless of whether they set requirements or standards that differ from a federal requirement that is directly applicable – are immune from being expressly preempted under the Act. This extreme position is wrong, for a number of reasons.

First, the Court has rejected this argument in several cases, holding that the use of terms such as "law," "standard," and "requirement" in a preemption provision plainly covers standards and requirements set by common law damages actions. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring); *id.* at 510 (O'Connor, J., concurring and dissenting in part); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); *id.* at 548-49 (Scalia, J., concurring and dissenting in part). The reasons for the Court's repeated holdings on this point of interpretation remain sound as the Court addresses it once again in this case.

In *Cipollone*, the Court was obliged to construe the express preemption provisions contained in two successive federal statutes – the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282 (1965), and the Public Health Cigarette Smoking Act of 1969, 84 Stat. 87. The Court determined that in the preemption clause in the 1965 Act, "Congress spoke precisely and narrowly: 'No statement relating to smoking and health shall be required in the advertising of [properly labeled] cigarettes.'" *Cipollone*, 505 U.S. at 518

(quoting section 5(b) of the 1965 Act). The Court noted that this language was consistent with "the continued vitality of state common-law damage actions," and was "best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels." *Id.* at 518-19.

The Court held, however, that Congress changed the situation dramatically by enacting the "much broader" preemption clause contained in the 1969 Act. 505 U.S. at 520. That provision introduced new constraints upon all manner of requirements, duties, and standards imposed under state law by stating that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes" that are labeled as required under federal law. 15 U.S.C. § 1334(b). Based on this language – particularly the reference to "requirement[s] or prohibition[s] . . . imposed under State law" – the Court held that common law actions were within the coverage of the preemption clause in the 1969 Act. 505 U.S. at 520-24.[4]

In *Cipollone*, therefore, the Court specifically rejected the linguistic argument urged by petitioner here in an attempt to limit the scope of terms such as "standard" and "requirement" to exclude the effects of damage actions brought under state common law. The Court explicitly found this argument to be "at odds both with the plain words of the 1969 Act and with the general understanding of common-law damages actions." 505 U.S. at 521. In a key passage that squarely resolves this issue, the Court stated: "The phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules." *Id.* Even though there was some evidence in the legislative history suggesting that Congress "was primarily concerned with positive enactments by States and

[4] The plurality opinion on this point actually speaks for the majority, for it is reinforced by the express agreement of Justices Scalia and Thomas. *See* 505 U.S. at 548-49 (Scalia, J., concurring and dissenting in part).

localities," the Court was emphatic that "the language of the Act *plainly* reaches beyond such enactments." *Id.* (emphasis added).[5]

The Court dispatched the same argument more briefly in the *CSX* case, where it considered the preemptive effect of the Federal Railroad Safety Act of 1970, 84 Stat. 971. The preemption clause contained in that statute provided that applicable federal regulations would preempt any state "law, rule, regulation, order, or standard relating to railroad safety." 45 U.S.C. § 434.[6] In a single sentence, the Court treated the issue as settled, flatly stating that "[l]egal duties imposed on railroads by the common law fall within the scope of these broad phrases." 507 U.S. at 664 (citing *Cipollone* plurality and concurrence). No member of the Court dissented from this proposition.

In *Medtronic*, the Court addressed the Medical Device Amendments of 1976, 90 Stat. 539, which contained a preemption clause barring any State from "establish[ing] or continu[ing] in effect" any "requirement" relating to the safety or effectiveness of a medical device that differed from any applicable federal requirement. 21 U.S.C. § 360k(a). Plaintiffs argued that "common-law duties are never 'requirements' within the meaning of [the statute] and that the statute therefore never pre-empts common-law actions." 518 U.S. at 502 (Stevens, J., plurality opinion).

[5] Justice Scalia's separate opinion, joined by Justice Thomas, expressly agreed that the broader language of the 1969 Act "plainly reaches beyond [positive] enactments," and "general tort-law duties" can impose requirements or prohibitions within the meaning of the 1969 Act. *See* 505 U.S. at 548-49 (Scalia, J., concurring and dissenting in part) (brackets in original).

[6] The Railroad Safety Act's preemption clause provided that "[a] State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement," but included an exception for "an additional or more stringent [state] law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard," when "not incompatible" with federal law. 45 U.S.C. § 434; *see* 507 U.S. at 662 n.2.

A majority of the Court directly rejected this argument. Justice Breyer, in a separate concurrence, stated that "[o]ne can reasonably read the word 'requirement' as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law." 518 U.S. at 504 (Breyer, J., concurring). After setting forth the Court's holdings to the same effect in *Cipollone* and *CSX*, Justice Breyer observed that the same rationale "would seem applicable to the quite similar circumstances at issue here." *Id.* He also agreed on this point with Justice O'Connor's separate opinion for four Justices, which held that state common law actions impose "requirements" because they "operate to require manufacturers to comply with common-law duties." *Id.* at 510 (O'Connor, J., concurring and dissenting in part) (citing *Cipollone*). The other Justices found it unnecessary to address the issue, since none of plaintiffs' claims was preempted in any event. *Id.* at 502-03 (Stevens, J., plurality opinion). The conclusion reached by the five Justices who addressed the question thus constitutes yet another holding that common law claims impose state law "requirements" within the meaning of such an explicit preemption clause. *See generally Marks v. United States*, 430 U.S. 188, 193-94 (1977) (majority of Justices reaching conclusion by way of "fragmented" opinions state "the holding of the Court").[7]

It bears mention that the Government's position in this case is flatly inconsistent with the position it took in *Medtronic*, where the Solicitor General stated: "[W]e do not agree with respondents' broad submission that the act's preemption provision does not speak at all to common law tort claims. In our view, the word 'requirement' in section 521(a) of the act encompasses duties imposed by State common law, as well as duties imposed by State statutory or regulatory law." Transcript of Oral Argument,

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[7] In addition, the Court has frequently held that the term "standards" refers to state common law as well as state positive law. *See, e.g., Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 114-15 (1987) (referring to "safety standards" set by California products liability law); *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 400 (1965) (referring to "common law standards"); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959) (referring to "standards of care" imposed by common law).

Medtronic, Inc. v. Lohr (U.S. No. 95-754), 518 U.S. 470 (1996), at 45. There the Solicitor General added that "*Cipollone* and the use of the requirement there, and just the nature of State law . . . would also encompass duties imposed by the . . . law from whatever source." *Id.* at 46.

Nothing in *Geier* requires a different approach here. There the Court noted but did not resolve the issue of whether "a tort action" involves "a safety standard." 529 U.S. at 867. Instead, the Court rejected express preemption based on the inferences that it drew about the necessary effect of the particular language of the saving clause contained in the Motor Vehicle Safety Act. That issue will be addressed in Section III, *infra*.

Second, even if petitioner's argument could somehow be squared with these decisions holding that the common law *does* impose requirements and standards of care, the argument is still plainly wrong because it ignores the ordinary interrelations between the substantive principles of the common law and statutory law in regulating the health, safety, and welfare of citizens in each state. Again, the Court discussed this point in *Cipollone*, and pointed out that "common-law damages actions of the sort raised by petitioner are premised on the existence of a legal duty, and it is difficult to say that such actions do not impose 'requirements or prohibitions,'" for "it is the essence of the common law to enforce duties that are either affirmative requirements or negative prohibitions." 505 U.S. at 522; *see also Medtronic*, 518 U.S. at 510 (O'Connor, J., concurring and dissenting in part) (state common law actions constitute "requirements" where they "operate to require manufacturers to comply with common-law duties").

In this regard, it simply does not matter whether the *remedy* used to enforce the substantive component of the state law is the payment of damages to private parties rather than the payment of fines to the government or some other enforcement mechanism. "Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 247 (1959). The Court has since reaffirmed this

position. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.").

The intricate relationship between state common law and state statutory and administrative law in regulating private conduct, and the extent to which they are inherently interwoven, is widely understood and readily demonstrated. Earlier in this century, the courts typically led the way on health and safety issues by applying and developing common law principles to regulate the private sector. The requirements, obligations, and standards imposed in accordance with these principles, in turn, were eventually codified and at times modified by state legislatures when they took the initiative to address particular concerns. On occasion, legislatures have enacted regulatory statutes conferring administrative authority on government agencies to regulate private conduct directly, while still retaining the common law to fill the remaining gaps between these positive enactments. The further interaction of state legislation and state common law adjudication often is even more complex, as legislative or regulatory enactments may be used to supply duties and standards of care underlying private damage actions. *See generally* Melvin Eisenberg, *The Nature of the Common Law*, (1988); Guido Calabresi, *A Common Law for the Age of Statutes* (1982).[8]

At the state level, therefore, it is undeniable that the common law forms an integral part of the law's comprehensive regulation of private conduct. Taken in combination with statutory and regulatory enactments, the common law imposes a continual procession of legal "requirements," obligations, prohibitions, and "standards" that are designed to influence and regulate the actions of businesses and individual citizens. *See, e.g., Medtronic*, 518 U.S. at 510 (O'Connor, J., concurring and dissenting in part) ("state common-

[8] Petitioner offers a strained construction of the statutory phrase "State or political subdivision" that would appear to read the courts entirely out of the framework of state governments. *See* Pet. Br. 27-28. This approach overlooks the fact that the statute in *Medtronic* contained the same phrase ("State or a political subdivision"), and a majority of the Court held that its preemption clause reached common law claims.

law damages actions operate to require manufacturers to comply with common-law duties"). Any reading of these terms that would pose a putative distinction between common law and positive law in this respect would be fundamentally misguided. *See id.* at 504 (Breyer, J., concurring) ("The effects of the state agency regulation and the state tort suit are identical.").

Third, the argument presented by petitioner and the *amici* rests on the odd assumption that Congress intended an *ad hoc* collection of state citizens assembled to hear one civil case – a jury – to have greater power to set standards that differ from federal law than do sovereign state officials acting through the careful, deliberative processes established in the legislative and administrative spheres. Such a result would be a perverse undermining of the democratic process. The Court should not assume that Congress intended "this anomalous result" unless it clearly so provided. *See Medtronic*, 518 U.S. at 504 (Breyer, J., concurring). Certainly nothing in the language of the Boat Safety Act requires this upside-down world view. Indeed, for the reasons stated above, Section 4306 plainly contemplates that state juries, just like state administrative and legislative officials, set "standard[s]" and "requirement[s]" that may therefore be preempted by federal regulatory action. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (the "test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised").

Indeed, petitioner's argument on this point is so plainly wrong that, if accepted here, its logic would partially overrule *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The very same argument that petitioner and the *amici* put forward with respect to the text of Section 4306 would apply equally well to the term "laws" in the Rules of Decision Act, 28 U.S.C. § 1652. The Rules of Decision Act requires a federal court to apply "[t]he laws of the several states" as the rules of decisions in civil actions not arising under federal law. *Id.* Applying the logic of petitioner's argument, because the Supremacy Clause refers also to "the *Laws* of the United States," U.S. Const., art. VI, cl. 2 (emphasis added), and because there is no general common law of the United States, then the phrase "the laws of the several states" should be limited to the *positive* law of the several states, thereby excluding state common

law as the governing rules of decision in federal courts. Adopting this argument thus would have the pernicious consequence of upsetting the entire interpretive basis for the longstanding and important *Erie* doctrine.

It is therefore not surprising that, in *Cipollone*, the Court rejected the parallel argument that the phrase "State law" included *only* state statutes and regulations, but not state common law. *See* 505 U.S. at 522-23; *see also id.* at 549 (Scalia, J., concurring and dissenting in part) (agreeing that the phrase "State law" used in the 1969 Act "embraces state common law"). The Court recognized that this argument was flatly irreconcilable with its longstanding construction of the same basic language in the Rules of Decision Act. *See Erie*, 304 U.S. at 77-78. Indeed, the Court indicated no desire to revisit the controversial battles fought over many decades that led up to the Court's historic decision in *Erie* to overrule the contrary interpretation of the Rules of Decision Act that had been adopted in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). Instead, the Court simply noted that "we have recognized the phrase 'state law' to include common law as well as statutes and regulations." *Cipollone*, 505 U.S. at 522. For all the same reasons, the efforts made in this case to limit "requirement[s]" and "standard[s]" to state positive law must fail in this case.

III. SECTION 4311(g) CONCERNS THE EFFECT OF COMPLIANCE WITH FEDERAL LAW, AND DOES NOT DIRECTLY LIMIT THE SCOPE OF THE PREEMPTION CLAUSE.

The Boat Safety Act contains a provision that is often referred to as a "saving" clause. In this statute, the clause follows companion provisions that specify liability for civil penalties and injunctive relief; it then states that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). Petitioner and the Solicitor General contend that, under *Geier*, this provision establishes common-law claims as beyond the reach of the preemption clause. *See* Pet. Br. 28-32; U.S. Br. 12-13. But that does not square with the relation between the preemption clause and this provision, with

the text of this provision, or with the clear purpose of this provision, as explained by Congress.

In *Geier*, the Court ruled that because the saving clause in the Motor Vehicle Safety Act referred specifically and solely to "liability at common law," and in the context of that statutory scheme a broad reading of the preemption clause would virtually extinguish any common-law liability whatsoever, it would be necessary to give the preemption clause "a narrow reading that excludes common-law actions." 529 U.S. at 868. As discussed above, however, *see* Section I, *supra*, the same problem does not arise under the Boat Safety Act because the Secretary is expressly empowered to preserve common-law liability by exercising his express authority to "issue an exemption" from preemption under the Act or under any regulation adopted pursuant to it. *See* 46 U.S.C. §§ 4305 & 4306. Thus, the rationale for reading the preemption clause narrowly under the Motor Vehicle Safety Act is inapplicable to the Boat Safety Act: there is no reason for this Court to assume the role that Congress conferred upon the Secretary, by construing the statute in order to grant exemptions from preemption under the Act.

In addition, the saving clause contained in the Boat Safety Act differs in a key respect from the analogous provision in the Motor Vehicle Safety Act: the saving clause here does not refer specifically and solely to common-law actions, but refers instead to "liability at common law *or under State law*." 46 U.S.C. § 4311(g) (emphasis added). The inclusion of this additional phrase thus makes clear that the ambit of this provision is broader than mere common law and does not speak specifically to common-law claims. And given that the same statute speaks of persons being "liable" for civil penalties, *see id.* §§ (b) & (c), it is evident that "liability" under "state law" cannot be narrowly construed as limited to private actions for payment of compensatory (and potentially punitive) damages, despite the Solicitor General's half-hearted argument to the contrary. *See* U.S. Br. 13 n.2. For these reasons, the notion that the preemption clause must be read narrowly to exclude common-law claims – based on a supposed need to accommodate the terms of a saving provision that applies here expansively to *all* claims for fines, penalties, or compensatory or punitive damages imposed

under state law – is simply untenable. In fact, if petitioner's reading of this provision were to be adopted, then it would become a complete "anti-preemption" clause, and *all* state law – whether statutory, administrative, or judge-made – would remain in effect as a basis for imposing liability for damages or penalties against manufacturers, thus completely nullifying the plain import of the preemption clause.

The confusion spawned by Section 4311(g) is perhaps to be expected, because in the Boat Safety Act this provision does not serve the purpose of "saving" state positive law or state common law from preemption at all. The preemption clause contains its *own* saving provisions, which are explicitly designed to specify when state law is preserved in the face of the broader general language of the preemption clause. Those provisions operate to save state law from preemption in the three distinct circumstances discussed in Section I, *supra*.

Indeed, Section 4311(g) says nothing about the kinds of state laws that are preempted or saved from preemption. Rather, it simply disclaims any possibility that a manufacturer will be able to assert a federal immunity from liability at state law based on its mere compliance with those requirements imposed by federal law. This provision thus works in tandem with the preemption clause by ensuring that the boundaries of federal preemption are not improperly expanded by a broad "government standards" defense, which might be asserted to impede the enforcement of otherwise valid state law.

Section 4311(g) should thus be understood as an "anti-affirmative-defense" clause, which operates to preserve state authority on how to treat the issue of a manufacturer's compliance with pertinent federal standards and requirements, rather than as an "anti-preemption" clause. For example, where state common law addresses "uniquely hazardous" local conditions, as expressly permitted by Section 4306, this clause would ensure that federal law is understood to place no limits on how state courts treat the issue of compliance with any federal requirements. In this manner, Congress specified that unless state common law is actually *preempted*, it cannot be circumscribed by legal inferences that might otherwise be drawn about a party's *conduct* in exercising due care

by complying with the federal regulatory scheme. *See, e.g.*, *Restatement (Third) of Torts: Products Liability* § 4, cmt. e (1997) (explaining the "important distinction" between "the matter of federal preemption of state products liability law" and "the question of whether and to what extent, as a matter of state tort law, compliance with product safety statutes or administrative regulations affects liability for product defectiveness").

The Senate Report accompanying the Act confirms this interpretation. Congress intended, with respect to Section 4311(g), that "mere compliance . . . with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary use." S. Rep. No. 92-248, at 32 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1352. The references to "not . . . a complete defense" and "evidentiary value" further establish that this provision simply ensures that the States will have the flexibility to determine whether a party's compliance with pertinent federal requirements can serve as the basis for an affirmative defense or immunity asserted to defeat an otherwise permissible state-law cause of action, or to negate any claim for punitive damages. In practice, the States differ in their views of such an affirmative defense, and on the admissibility of evidence of compliance with federal standards on the issues of defectiveness and due care.[9]

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[9] Each State thus remains free to determine for itself whether compliance with pertinent federal requirements (the "government standards" defense) is a relevant factor or an affirmative defense under state law in adjudicating an otherwise permissible cause of action. There are diverse views on this issue under state law. Some States recognize a rebuttable presumption that a product which complies with federal standards is not defective. *E.g.*, Mich. Comp. L. Ann. § 600.2946(4) (West 2002); Kan. Stat. Ann. § 60-3304(a) (2001). Others hold compliance with federal standards is relevant to whether there is a defect, but not conclusive or presumptive evidence. *E.g.*, *Wagner v. Clark Equip. Co.*, 700 A.2d 38, 49-50 (Conn. 1997); *Brooks v. Beech Aircraft Corp.*, 902 P.2d 54, 63 (N.M. 1995). A few states may hold that compliance conclusively negates any defect, *e.g.*, *Beatty v. Trailmaster Prods. Inc.*, 625 A.2d 1005, 1013-14 (Md. 1993), while others may treat compliance as irrelevant and inadmissible, *e.g.*, *Sheehan v. Cincinnati Shaper Co.*, 555 A.2d 1352, 1355 (Pa. Super. 1989).

The contrary reading of this provision proposed by petitioner would, in addition, flout Congress' intention that "[t]he need for *uniformity* in standards if interstate commerce is not to be unduly impeded supports the establishment of *uniform* construction and equipment standards at the Federal level" and that "manufacture for the domestic trade will *not* involve compliance with widely varying local requirements." S. Rep. No. 92-248, at 14, 20 (emphases added).

Finally, the Court's prior cases have consistently held that the general language of a so-called "saving" clause cannot negate the terms of an explicit preemption clause. The Court has frequently been faced with potentially competing preemption and general saving clauses, and has given the latter provisions limited effect in the context of the statutory scheme as a whole. *See, e.g., Locke*, 529 U.S. at 106-07; *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992). More generally, the Court has routinely given so-called "saving" clauses a narrow reading in order to render them consistent with the preemptive thrust of the statute as a whole. *See, e.g., American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995) (state fraud suit expressly preempted notwithstanding saving clause providing that statute does not "abridge or alter the remedies now existing at common law or by statute") (quotation omitted); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-52 (1987) (saving clause given narrow reading after the Court looked "to the provisions of the whole law, and to its object and policy") (quotation omitted).[10]

Therefore, Section 4311(g) of the Boat Safety Act cannot properly be read to nullify or abridge the explicit terms of the preemption clause.

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[10] The Solicitor General's suggestion that the federal safety standards should be understood as mere "minimum" standards, *see* U.S. Br. 14, proves too much, for it would exempt all state law from the reach of the preemption clause. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 n.19 (1978) (rejecting argument that because statute referred to "minimum standards," it "requires recognition of state authority to impose higher standards").

IV. PETITIONER'S CLAIMS ARE ALSO IMPLIEDLY PREEMPTED BY THE COAST GUARD'S AFFIRMATIVE DECISION NOT TO REGULATE BY REQUIRING PROPELLER GUARDS.

Even if not expressly preempted, petitioner's claims would fail in this case under an implied-conflict preemption analysis. At the outset, it is important to note what is *not* at issue here: as the Court has now established, the mere existence of a preemption clause and of a so-called "saving" clause in the Boat Safety Act does not eliminate the need to apply the settled principles of implied preemption in determining the proper relationship between federal and state law. *See, e.g., Buckman, Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001); *Geier*, 529 U.S. at 869.

In addition, for the reasons discussed in Section I, *supra*, the holding in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), has no bearing upon the distinct statutory scheme at issue here. In *Myrick*, the Court held that state common law was not preempted either expressly or impliedly under the Motor Vehicle Safety Act where the federal agency had no safety regulation in place and this omission "did not result from an affirmative decision of agency officials to refrain from regulating." *Id.* at 286-87. The Court pointedly noted the controlling language of the federal statute, which stated that its "preemption clause applies *only* '[w]henever a Federal motor vehicle safety standard . . . is in effect' with respect to 'the same aspect of performance' regulated by a state standard." *Id.* at 286 (quoting statute) (emphasis added). As discussed previously, the operative language of the preemption clause in the Boat Safety Act is diametrically the opposite: it directly provides for preemption of state law *without regard to* whether a federal safety standard or requirement is in effect, "[u]nless permitted by the Secretary [issuing an exemption authorized] under section 4305." 46 U.S.C. § 4306.

Moreover, there is no doubt that here the Coast Guard's decision not to adopt a federal regulation governing propeller guards *did indeed* "result from an affirmative decision of agency officials to refrain from regulating." *Myrick*, 514 U.S.. at 286-87; *see also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978). Neither petitioner nor the Solicitor General ever questions that fact: on May

11, 1988, the Coast Guard initiated an eighteen-month review process pursuant to the governing statute, with the explicit objective of considering whether to require manufacturers to install propeller guards and with the mandate to "consider, review, and assess available data concerning the nature and incidence of recreational boating accidents in which persons in the water are struck by propellers." J.A. 12 (National Boating Safety Adv. Ccl., Propeller Guard Subcomm. Rep., at 1 (Nov. 7, 1989)). At the culmination of that agency-initiated review process, the Coast Guard accepted all of the recommendations submitted in the Report, and decided to "take no regulatory action to require propeller guards." J.A. 80 (Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard to A. Newell Garden, Chairman, National Boating Safety Adv. Ccl., at 1 (Feb. 1, 1990)).

Instead, petitioners mount a different attack by denigrating the authority of the National Boating Safety Advisory Council, which it derides as not being composed of federal officials, *see* Pet. Br. 40-41; more surprisingly, the Solicitor General takes the same tack by seeking to dismiss the Advisory Council out of hand as not a "federal entity," *see* U.S. Br. 29. In fact, the Advisory Council is, as its name indicates, a federal entity established pursuant to federal law, *see* 46 U.S.C. § 13110, comprising numerous public officials as members, and bearing official governmental responsibilities and duties, including some set forth in the Boat Safety Act itself. Most notably for our purposes here, under the Boat Safety Act, Congress imposed a mandatory requirement that the Secretary "shall" consult with the Advisory Council before prescribing "any regulations" under the Act. *See* 46 U.S.C. § 4302(c)(1)-(4). The Advisory Council thus plays a central and essential role in the very process that is the focus of this case: the Coast Guard's process (as delegated from the Secretary) for deciding whether or not to institute safety regulations under the Boat Safety Act.

In the end, however, there is simply no dispute here – nor could it plausibly be disputed – that the Coast Guard's careful examination of the propeller guard issue and its ultimate decision at the close of that process resulted in "an affirmative decision of agency officials to refrain from regulating." *Myrick*, 514 U.S. at 286-87. Instead, the debate here is over not whether the Coast Guard *made* such an

affirmative decision not to regulate, but what the *reasons* were for its decision.

After approximately eighteen months of investigation and evaluation of testimony, statistics, and other evidence, the Advisory Council received the final report from its Propeller Guard Subcommittee, including the results of its examination of the propeller guard issue. Its recommendation was that the Coast Guard "should take no regulatory action to require propeller guards." J.A. 40. The principal basis for this recommendation was the finding that requiring propeller guards could give rise to other safety concerns, including:

> (1) increasing "the potential of blunt trauma injury, which becomes increasingly significant at speeds over 10 mph, leading to an ascending serious risk of fatality as speeds increase," J.A. 36;
>
> (2) creating a "new hazard . . . in that an arm, leg, etc. may be caught by the bars or ring and held against the rotating propeller. . . . with a very real risk of impacting and/or entrapping a body appendage," J.A. 36;
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> (3) "affect[ing] boat operation adversely" at "speeds of approximately 10 mph or greater," J.A. 57.

The Advisory Council voted unanimously to approve this Report and adopt its recommendations; thereafter, it transmitted the full Report to the Coast Guard as its own submission on the subject. *See* J.A. 74-78 (Minutes of the National Boating Safety Adv. Ccl. (Nov. 7, 1989)). The Coast Guard, in turn, accepted all of the Report's recommendations and decided to "take no regulatory action to require propeller guards." J.A. 80. There is no indication at any point that the Coast Guard disapproved any of the evidence and conclusions compiled by the Advisory Council or disagreed with any of its reasoning.

In these circumstances, the implied preemption analysis in this case is controlled by *Geier*. Here, as with the duty to install an airbag pursuant to a rule imposed under state tort law, petitioners' common-law claim "by its terms would have required manufacturers of all similar [boats] to install [propeller guards]." *Geier*, 529 U.S.

at 881. This "requirement" thus would have defeated the regulatory regime adopted by the Coast Guard, which explicitly refused to "require propeller guards," J.A. 80, and instead made "an affirmative decision . . . to refrain from regulating." *Myrick*, 514 U.S. at 286-87. The approach endorsed by the Coast Guard was to continue to assess the competing safety considerations by "continu[ing] to collect and analyze accident data for changes and trends" and to review "development and testing of new propeller guarding devices or other information on the state of the art." J.A. 81. Just as in *Geier*, therefore, the agency here decided not to impose a single mandatory approach but instead to monitor a field where manufacturers tried and implemented different approaches as a way to "lower costs, overcome technical safety problems, [and] encourage technical development," all as a means of promoting its "safety objectives" in carrying out its statutory obligations under the Boat Safety Act. *Geier*, 529 U.S. at 875. Indeed, here – unlike in *Geier*, where the agency did require a fixed and increasing amount of airbag installation in new motor vehicles, *see* 529 U.S. at 878-80 – the Coast Guard decided not to require propeller guards to be installed on any boats *at all*, thus giving manufacturers maximum flexibility and making any rigid requirement imposed under state law an obvious "obstacle to the accomplishment and execution of" the agency's objectives. *Id.* at 881-82 (quotation omitted).

Accordingly, in these circumstances the Coast Guard made a considered decision not to regulate by mandating propeller guards on recreational vessels, in some measure because it had been determined that to do so would disserve the core safety objective of the Boat Safety Act.[11] On this record, the agency's decision "takes on the character of a ruling that no such regulation is appropriate or

[11] The Solicitor General similarly frames the issue as whether the "Coast Guard's *decision* in 1990 not to require propeller guards" results in implied preemption, U.S. Br. 15 (emphasis added), though his explanation of the underlying basis for the agency's decision is somewhat different.

approved pursuant to the policy of the statute." *Ray*, 435 U.S. at 178 (quotation omitted).[12]

It would also be unfair and impractical to hold manufacturers liable for any penalties, fines, or compensatory or punitive damages imposed under state law for conforming the design of their vessels to the governing federal agency's explicit determination that requiring the installation of propeller guards would undermine the public safety. The conflicting signals of state and federal policy pose an obvious potential to whipsaw citizens who wish only to abide by the laws and policies of their respective governments. There can be little doubt that if any manufacturer had ignored the safety concerns and installed propeller guards, these concerns would have featured prominently in any lawsuit arising from a blunt trauma injury or fatality of the sort identified in the agency's determination not to mandate propeller guards on recreational vessels.[13]

In sum, the Coast Guard's decision not to require propeller guards where doing so would disserve the core safety objectives of the Boat Safety Act necessarily leads to the conclusion that such a standard or requirement imposed either by state positive law or by state common law is impliedly preempted. *See, e.g.*, *Ray*, 435 U.S. at 178; *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) ("a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate").

[12] The Solicitor General's efforts to distinguish *Ray*, *see* U.S. Br. 20-22, are unpersuasive. First, it cannot matter whether the federal agency is required to act or permitted to act; what matters is simply whether it is *authorized* to act. Second, the regulations imposed under the Boat Safety Act are quite comprehensive. *See, e.g.*, 33 C.F.R. Pts. 173-75, 177, 179, 181, 183, 187.

[13] Propeller guards are described and depicted in the Subcommittee Report. *See* J.A. 29. In the appendix to this brief, we reproduce three photographs of propeller guards that are part of the administrative record compiled by the Subcommittee. These photographs were made available to all parties by the Coast Guard and the Solicitor General during the briefing of this case.

CONCLUSION

For these reasons, the decision below should be affirmed.

Respectfully submitted,

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